No. 96-665

Supreme Court, U.S.
FILED
DEC 2 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ENERGY TRANSPORTATION CORPORATION,

Petitioner,

—v.—

JIMMIE GARNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
26 Broadway
New York, New York 10004
(212) 422-6111

Attorneys for Petitioner

14 pp

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases PAGE

Gasperini v. Center for Humanities, Inc., 518 U.S. ___, 135 L.Ed.2d. 659 (1996) 1, 10

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)..... 10

Other Authorities:

Rule 59(a) F.R.Civ.P..... 9

Rule 605 F.R.Evid..... 9

ARGUMENT

This petition involves a $1,100,000 jury verdict following trial in which the presiding judge testified "It was a word ["truthful"] he [respondent] didn't understand" and "Lying . . . usually that doesn't happen" which he refused to set aside as contrary to the weight of evidence despite his belief expressed out of the jury's hearing: "I think the facts are entirely different from what he [respondent] testified to". In his answering brief, respondent says: "Petitioner submitted evidence that it claimed impeached the evidence presented by Respondent" which "contentions were rejected by the jury", an assertion that jury findings of fact are final. He also claims: "After the jury verdict, the district court considered, but denied, Petitioner's motion for a new trial . . . ." but does so without acknowledging: (1) In the Second Circuit it is an abuse of discretion for a trial judge to grant such a motion if in doing so he or she disagrees with the jury's evaluation of credibility; and (2) in *Gasparini v. Center for Humanities, Inc.*, 518 U.S. ___, 135 L.Ed.2d 659, 677 (1996) this Court held: "In keeping with the historic understanding, the re-examination clause does not inhibit the authority of trial judges to grant new trials for any of the reasons for which new trials have . . . been granted in actions at law in the courts of the United States". In effort to show "[e]ssentially" the ". . . Petitioner receive[d] a fair trial" respondent demonstrates why it did not; and precisely how the trial judge's testimony had most harmful impact. By arguing "facts" which distort the record shamefully, respondent shows why trial judges must have "large" discretion to grant new trials where the verdict even might be based upon false evidence. He also proves why reexamination of facts found by the jury is an essential Due Process protection by demonstrating the extent to which his proof was only "consistent with" a particular inference or document and as a result only seems to have weight but, in fact, has none.

Respondent asserts: "During the trial, it became evident that Petitioner's key witnesses . . . did not tell the truth" and that "[t]he jury rejected their testimony, not because of the district court judge's trial conduct, but because their falsehoods were exposed", a claim belied by his attorney's statement in summation that he ". . . can't say" petitioner's fact witnesses "didn't believe the things they told you" because it had been necessary for them to "reconstruct" their testimony based upon "documents with numerous errors" (A1349). Respondent then claims that the charge to jury "described a legally acceptable view about witness intentional falsification compared to mistaken memory" which he claims was not error for the further reason that the judge said he had no "impression of what . . . the facts are" as well as: "Now I don't have any idea whether that happened in this case." Ignoring the fact that if he had "no way of knowing whether that happened in this case" the judge could have no reason to believe either that lying had or had not occurred in any other, respondent also claims that the *falsus in uno* charge corrected any error although it establishes that the judge does not know—but nonetheless told the jury was fact—had fundamental impact upon its assessment of credibility in a case which respondent states: "Without question . . . was hotly contested on nearly every fact presented" (Respondent's Brief, p. 8). Immediately after telling the jury his "legally acceptable view" the trial judge charged: ". . . if you are false in one thing you can be deemed to be false in everything" as well as ". . . if a witness sitting on that stand has testified . . . falsely, and it was to an important matter, you are entitled . . . to disregard that witness's testimony in its entirety". Respondent admitted that "in certain material respects" his October 14, 1992 affidavit given his own attorney contradicted his testimony and specifically that his statement: "On 1/6/91, I mentioned to the chief mate that I injured my knee at home, and my knee was swollen" was not "truthful" as well as not "accurate" (20a). His affidavit "was an important matter" a fact proven by respondent's claim:

"The court then addressed Petitioner's major concern in this case, the supposed 'inconsistent statements' Petitioner claims Mr. Garner made". Respondent next describes a matter which petitioner "fail[ed] to recount" in its petition—the "general rule about prior inconsistent statements"—in which the judge told the jury: "If you find that the inconsistency was deliberate and had a motive, then, naturally, you take that into account very seriously in considering the rest of the witness's testimony" while to the contrary: "If you decide, though, it was just a mistake or seems to the witness an unimportant matter, why then you evaluate it accordingly".

After Mr. Garner responded "No, sir" to petitioner's question whether his affidavit was "truthful", the judge intervened to offer his own explanation "It was mistaken". There is no doubt that by asking a "question" that couldn't have been more exculpatory the judge satisfied the jury that it needn't consider whether ". . . the inconsistency was deliberate . . . ." Instead, he assured it, directly contrary to respondent's testimony, that Garner's admission of perjury prior to trial was "just a mistake". He therefore also showed the jury why it shouldn't conclude that the inconsistency between what respondent said at trial and the facts sworn to in his affidavit ". . . had a motive" and, hence, would be but for the judge's intervention a matter which the jury should "take into account very seriously in considering the rest of . . . [his] . . . testimony". In fact, if inconsistency was "just a mistake", the fact that the jury was told it should "evaluate it accordingly" meant it should ignore inconsistency and not disbelieve the rest of respondent's testimony. The trial judge, however, went even further by telling the jury that "truthful" was "a word [respondent] didn't understand". He therefore relieved him of his admission of false swearing and as a result removed the "if a witness sitting on the stand has testified falsely" *falsus in uno* predicate for the jury's right "to disregard that witness's testimony in its entirety". The judge did so after he recognized that respondent had admitted perjury. During oral

argument of its new trial motion, petitioner claimed: "Jimmie Garner in the course of cross-examination admitted that he perjured himself in that affidavit" by agreeing that ". . . the affidavit was not only inaccurate but also said it was untruthful" to which the judge responded: "That is not necessarily perjury unless he knew it was untruthful at the time he said it" (10a). In his answering brief respondent *agrees* that he admitted committing perjury. His attorney claims that when "Mr. Garner said 'no' [ ] [t]he court . . . asked if Mr. Garner had meant to say that he intended to falsify the statement in the affidavit, and was admitting that he lied when he signed it" (Brief, p. 17), a concession that what he, in fact, had said included admission of intention to falsify, making what he had "meant to say" irrelevant; and the court's questions did not clarify respondent's testimony, they changed it. Thus, respondent himself has proven that the "comments" immediately thereafter: "That's it, no more discussion" and only a very brief time later: "It was a word he didn't understand" (21a) were gross and utterly inexplicable error. That conceded, respondent, for the first time in his brief in this Court claims that what he admitted was not "truthful" was not "important".

Respondent now claims (Brief, p. 19): "The topic on which he was cross-examined was whether Mr. Garner reported his accident at home by January 6 to the *Mate*, as the affidavit stated, or the *Captain*, as his testimony revealed" (emphasis in original) and: "Clearly, it ultimately is irrelevant which senior officer it was to whom he reported the incident" because "[t]he important thing was that Mr. Garner testified, *consistent with* his affidavit, that by January 6, 1991 he had reported to one of the senior officers that he had had a *slight* knee injury at home" (emphasis added). Although the captain never claimed that he had examined respondent's knee after he was told of his accident at home and had nothing to do with the preparation of the medical log, respondent's counsel's claimed in summation, that "Mr. Garner was being

penalized for his honesty" (A1328-9) in telling the captain of his knee injury at home (A349). Respondent admitted that when he signed it he had known that the medical log (Ex. "24", A1577) spoke of the condition of his knee on January 6, 1991 (A639-40, A706-9). In his affidavit, Mr. Garner admitted that "[o]n 1/6/91" the chief mate "gave me Ibuprophen 800 mg, one tablet three times a day", "placed in his report [i.e., the medical log a copy of which respondent at the time his affidavit was executed had (A380)] 'light duties, stay off knee as much as possible' " and that he "was given an ace bandage". Respondent claimed at trial that Ibuprophen had been left on his desk on January 6, 1991 (A352-53) although the mate did not examined his knee before his shipboard injury (A374-5) and also testified that he was not given an ace bandage until January 18, 1991 (Ibid.). Before totally contradicting its contents by testifying that when, allegedly on January 22, 1991, respondent signed it he believed it was "consolidated" with description of treatment after his January 17, 1991 accident, his counsel introduced the question of the medical log's accuracy by saying: "I want to turn to one of the critical issues in this case" (A342). The mate prepared the log and it was he who testified that on January 6, 1991 and repeatedly thereafter before his alleged shipboard injury respondent's knee was in "terrible shape" (A196). It is because the mate upon hearing of a seaman's injury before joining would surely have examined and would not likely have given Ibuprophen or an ace bandage without doing so, that respondent's denial, both that the mate had examined on the date the log indicates or at any time until after January 17, 1991 (A628-30), was so significant. In fact, the Injury Report, Ex. "10" (26-27a), identifies the date of respondent's injury as December 27, 1990. For these reasons, respondent *had to* claim that the mate had had no reason to examine because not told of his fall at home. (A380-1). This was crucial because he asserted that his knee was free of symptoms as of June 8, 1991, a "fact" assumed by his doctor in testifying to his opinion regarding connection between the injury in suit and need

for disabling knee replacement surgery more than two years later. But why if contrary to what the medical log states he did not have a "swollen, sprain to left knee" on January 6, 1991 would respondent swear in his affidavit "I believe my employer was negligent . . . in allowing me to stay on the ship after 1/13/91" when the vessel reached its first port after he joined? And why would the mate falsify a medical log when to do so is a violation of 46 U.S.C. 11301 and, hence, a basis for revocation of his license?

Respondent's "consistent with" testimony included effort to qualify Ex. "20" (A1573), a requisition for a shipyard repair of the No. 4 winch on the ship's port side between cargo tanks Nos. 1 and 2, in order to "prove" the existence of a "fine residue of oil" on the deck "not far from" the "Nos. 1 and 2 winches, and the two anchor windlass on the foredeck" which allegedly the chief mate "confirmed. . .all were experiencing oil leakage problems" (Brief, p. 3). In fact, the chief mate testified that: "I can't specifically remember any specific winch oil leak problems. We had oil leak problems on winches, primarily up on the foredeck and the anchor windlass, and the number 1 and 2 winches, which were on the foredeck. I know there were oil leak problems there, but I don't recall oil leak problems, winches number 3 and 4 . . ." (A827). As plaintiff's Exhibit "1" (A1518), a photograph of the vessel with marking made prior to trial by respondent or his counsel, shows respondent allegedly fell on January 17, 1991 just aft of where No. 1 tank begins, a considerable distance along the length of the 998' vessel (A567) from where "on the forepeak" the Nos. 1 and 2 mooring winches and the anchor windlasses are located. Although respondent knew the only alleged fact that it was leaking and of his duty to be vigilant regarding clean up (A597), on January 18, 1991, the master, according to respondent, asked him to walk out on deck with him a distance of 650' (A593-7) on a "very high priority job" (A382) in order to visit the No. 4 winch. While on deck aft of the No. 1 tank directly across from where on

the vessel's starboard side respondent's March 13, 1991 accident occurred—and the length of No. 1 tank further aft of where Exhibit 1 indicates his knee injury happened—respondent observed that a "coupling" to the winch's "hydraulic tank" had been "put in [ ] backwards" at "the prior shipyard". At that time the master supposedly said this resulted in "a leaky winch" and contamination of the deck where Garner allegedly slipped. The master then added that the defect causing the leak could be fixed only in shipyard and not aboard ship. (A383). Thus, through his oral testimony respondent sought to establish a basis for admission of Ex. "20" which described the defect in the No. 4 winch but which said nothing concerning whether as result it leaked. This offer was rejected (A384-5) but upon cross-examination of the master, respondent's counsel tried again to establish that the defect described in the repair requisition could cause a hydraulic fluid leak, a fact Captain Smith denied (A1256-7) and he, of course, never called a witness to say to the contrary that it could. Respondent so testified although at his deposition he had admitted that he couldn't say that oil from the allegedly leaking winch had "played any role" in causing his January 17, 1991 alleged fall (A589). This contradiction was explained because he didn't then have the "work log" (Ex. "12", A1565-9) and "had no way of proving" what he "needed . . . [to] . . . prove" (A699-700). This "proof" is described in respondent's brief (p.3) as: "The deck work log . . . recorded that where Mr. Garner fell was thoroughly cleaned and degreased two days after his accident" although this area was "between tank Nos. 1 and 2" (A1568, 1/19/91 entry) and, hence, the length of No. 1 tank aft of where Ex. "1" shows his accident occurred. Respondents claim of liability for his knee injury is therefore inconsistent with his sworn testimony prior to trial but allegedly "consistent with" a ship's record. Respondent also offered a receipt (Ex. "25", A1590) for "deck degreaser" received aboard ship April 1, 1991 as evidence that his March 13, 1991 elbow injury had been caused by its absence prior to delivery. In his brief in the

court of appeals (pp. 25-6) respondent established that "consistent with" was not a proper basis for admission of Ex. "25"—he claimed that the jury could believe that delivery was "more than mere coincidence" and, hence, could speculate that because degreaser was received on the ship so soon after his accident it had run out at the time of his elbow injury. In addition, respondent's assertion there was ". . . ample, strong evidence that the decks of the ship were dangerous" (Brief, p.9) is based on "consistent with" absence of records of delivery of "non-skid" additive and the testimony of a shipmate, Joseph Morrison. Respondent claims that this witness, who the trial judge said "clearly committed perjury" (A817), "testified that the deck where . . . [respondent] . . . fell was devoid of functional non-skid paint" (*Ibid.*, p. 3). Morrison agreed that "[t]here was no nonskid in the paint" (A723) in response to a question by respondent's counsel who at the time had a statement (Ex. "71", A1729) in which this witness had said to the contrary: "there was not enough non-skid sand mixed with the paint" and as a result respondent's brief is also only "consistent with" the facts. Whether there was no, or, instead, not enough, non-skid material was important because it is added to deck paint (A688, A723) under the bosun's supervision and respondent had served aboard the vessel in that capacity previously (A422-3). Although none of this proves that the jury's verdict was necessarily wrong, there is no doubt that "consistent with" raises a most serious issue of weight of evidence and in this case there was proof in addition of respondent's perjury—In referring to his affidavit he also said: "I totally disagreed with it" (A569), testimony confirming that he knew its contents were false when he signed it. Because it is not believable that an affidavit given by a party to his attorney would be materially inaccurate, respondent had to admit that he had known that it was also not "truthful". Doing so benefitted his case because the trial judge's personal accommodation to his powerlessness in the face of perjury is to insist that it has and does not occur.

Respondent says correctly that "counsel for petitioner made no objection to the Court's inquiry" beginning with "What do you mean by 'No, sir' " but wrong to say the issue was not preserved for appeal. Rule 605 F.R.Evid. provides: "No objection need be made in order to preserve the point". The judge, not respondent, testified: "It was a word he didn't understand" and that "fact" would not have been known to the jury had he not, despite which respondents assert "the judge never imposed his own opinions or conclusions on the jury" (Brief, p. 19). In addition, respondent claims that "petitioner at trial did not object to the court's jury charge" that in its experience "lying . . . usually that doesn't happen" although it objected during jury deliberations. (A1467). Of course, the trial judge's statement concerning his "experience" could not more clearly be evidence—the jury would not have known that "lying . . . usually that doesn't happen" had this "comment" not been made. Rule 605 F.R.Evid. excuses objection to judicial testimony since damage to reputation by effort to withdraw a statement of fact made to the jury by the trial judge would be too great and effective retraction would in any event be impossible.

More importantly, respondent, by failing to address the Rule 59(a) F.R.Civ.P. issue and, hence, the question of U.S. Const. *Amend V* Due Process, expects that the revolution achieved by the courts of appeals—making jury fact-finding unreviewable when weight of even "consistent with" proof depends upon credibility in "hotly contested" cases—will be embraced by this Court despite the fact that mistaken efforts to achieve "judicial economy" have the opposite effect and, far worse, cause loss of respect for the judiciary. Even before this Court, respondent argues that a verdict dependent upon testimony only "based upon truth" because "consistent with" other evidence which, in fact, is non-corroborative or impeaching, is good enough. But what else could he say? He certainly cannot claim that the Second Circuit is right to abolish Rule 59(a) F.R.Civ.P. in weight of evidence cases, that the

judge did not testify or that his affidavit was truthful because if it is his verdict was the result of fraud.

What respondent seems not to understand is that his misrepresentation of facts and their significance leads inevitably to consideration who best can distinguish whether "consistent with" proof has *any* probative value or, instead, is *totally* without weight; or whether it is *itself* evidence that the underlying claim is false. Although the answer in the ordinary case is the trial judge, asking, as respondent has, this Court to weigh "consistent with" evidence although neither it nor the courts of appeals can do so is the *best* argument why final decision on a new trial motion based on weight of evidence must depend upon the free exercise of discretion of the judge who tried the case. It is also clear that if this trial judge had discretion despite his personal opinion, and been permitted to exercise it, this case might not even have been appealed, thus demonstrates that the Second Circuit's "law" disserves even its apparent goal of "judicial economy". In *Gasparini v. Center for the Humanities*, *supra*, this Court considered the history of re-examination clause and this case proves what *will happen* if the wise interpretation this Court has always given it is not reaffirmed. In the Second Circuit it appears to make no difference whether a verdict is just or, instead, based upon false testimony, which is why this verdict was not set aside and the decision not to was affirmed. There is no doubt that neither the district court nor the court of appeals reexamined the facts found by the jury and as a result respondent's judgment could not be affirmed, were there no error during trial, without depriving petitioner of U.S. Const. V due process of law. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

CONCLUSION

A writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Dated: November 29, 1996

JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
26 Broadway
New York, NY 10004
(212) 422-6111

Attorneys for Petitioner